(15,803.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~919~~ 231.

J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY.

ON ~~A PETITION FOR A~~ WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1895.

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a *Certified Copy of the Record under Subdivision 3 of Rule 37, Rules of Supreme Court U. S.*

Transcript of record.

United States Circuit Court of Appeals, Fourth Circuit.

J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,
versus
EDWARD B. WESLEY, Defendant in Error. } No. 96.

In error to the circuit court of the United States for the district of South Carolina, at Charleston.

Record filed July 28th, 1894.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Richmond, Va.

1 *Agreement of Counsel.*

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

We, the undersigned attorneys representing the plaintiff and the defendants in this action, hereby agree that the following shall constitute the printed record and return in the above-entitled cause, on the appeal to the circuit court of appeals, sitting at Richmond, Virginia.

1. The style of the court and title of the cause.
2. The summons.
3. The complaint and answers.
4. The verdict and the judgment entered thereon.
5. The order extending the time to file the bill of exceptions.
6. The bill of exceptions.
7. The assignment of errors and petition for writ of error.
8. The bond.
9. The writ of error.
10. The citation.
11. The testimony.
12. The certificate of the clerk.

2 The part of the testimony to be printed in the record is the testimony of the witnesses W. H. Lyles and Dr. W. T. C. Bates; and the testimony of the defendant J. E. Tindal. The ap-

peal from the order refusing the motion for a nonsuit being waived.

16th July, 1894.

MELTON & MELTON,
Att'ys for Defendants.
LYLES & MULLER,
Plaintiff's Attorneys.

Filed 16th July, 1894.

3 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *District of South Carolina,* } *To wit:*

In the Circuit Court, Fourth Circuit. At Law.

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, on the first Monday in April, 1894, before the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had:

EDWARD B. WESLEY, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Defendants.

Be it remembered that heretofore, to wit, on the 13th day of February, A. D. 1893, the said Edward B. Wesley, by his attorneys, Messrs. Lyles & Muller, came into court and filed the following complaint, which complaint is in the words and tenor following:

Complaint.

UNITED STATES OF AMERICA, *District of South Carolina.*

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

The plaintiff above named, complaining of the defendant- herein, alleges:

4 1. That the plaintiff is, and at the times hereinafter mentioned was, a citizen of the State of New York, and that the defendants are, and at the times hereinafter mentioned were, citizens of the State of South Carolina.

2. That on the 16th day of February, 1892, the plaintiff purchased

from the commissioners of the sinking fund of the State of South Carolina, the following-described premises, situate in the city of Columbia, county of Richland and State of South Carolina, to wit: All that lot, piece or parcel of land situate in the city of Columbia, containing one-quarter of an acre, more or less, with the buildings and improvements thereon known as "Agricultural Hall" (formerly known as "Parker's Hall,") bounded on the north by land now or late of the estate of McAndrew, on the east by Richardson street, and on the south and west by lands now or formerly of Jacob C. Lyons; said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated the 3rd day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 106 and 107; also *att* that certain parcel or lot of land situate, lying and being in the city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the Agricultural Hall building and lot immediately in rear thereof, east by Richardson street, south by lot now or formerly of Jacob C. Lyons, and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker; said lot being a rectangular parallelogram in shape and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-six feet, and from east to west two hundred and eight feet; the said lot also joining a part of the Agricultural Hall block and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1875, and recorded in R. M. conveyance office for Richland county, in Book K of Deeds, pp. 319 and 320; the above-described two lots of land being the same conveyed to the State of South Carolina by deed of J. B. Johnston, dated April 9th, 1883, and recorded in R. M. conveyance office in Book P of Deeds, &c., p. 87, and said premises are worth, and at the times hereinafter mentioned were worth, at least sixteen thousand one hundred and sixty-five dollars, which said premises were the said day, by the direction and appointment of the plaintiff, conveyed by the said commissioners of the sinking fund to J. W. Alexander, to hold the same in trust for the use of the plaintiff, his heirs and assigns forever, and to permit the plaintiff to have and possess the same and to enjoy the profits, and in trust to convey the same to the plaintiff, his heirs and assigns, or such person as he might direct and appoint; that upon the request of the plaintiff, the said J. W. Alexander, by deed dated the 11th day of February, 1893, conveyed the said premises in fee-simple to this plaintiff.

3. That the plaintiff being so possessed thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff; and that the defendants are, and ever since the said 20th day of February, 1892, have been in possession of said premises and have been and still are withholding the same from the plaintiff, although plaintiff has demanded from the defendants the possession thereof, to the damage of the plaintiff ten thousand dollars.

4. That the value of the use and occupation of said premises is at least twenty-five hundred dollars per annum.

Wherefore, the plaintiff demands judgment against the defendants:

1. For the possession of said premises.
2. For ten thousand dollars, the plaintiff's damage by the withholding of the same.
3. For the value of the use and occupation of said premises since the 20th day of February, 1892, at the rate of twenty-five hundred dollars per annum.
4. For the costs and disbursements of this action.

LYLES & MULLER,
Plaintiff's Attorneys.

February 13th, 1893.

Filed 13th Feb'y, 1893.

6 *Summons.*

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

To J. E. Tindal and J. R. Boyles, defendants in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at their office, No. 18 Law Range, Columbia, S. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., this thirteenth day of February, anno Domini, one thousand eight hundred and ninety-three, and in the 117th year of the sovereignty and Independence of the United States of America.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.
LYLES & MULLER,
Plaintiff's Attorneys.

Filed 13 Feb'y, 1893.

Affidavit of Service.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

EDWARD B. WESLEY
vs.
J. E. TINDAL and J. R. BOYLES.

John A. Barre, beind duly sworn, says that he served the
7 summons and complaint in this action on the defendant- by delivering to them personally, and leaving with them copies of the same, at their residences, on the 13th day of February, A. D. 1893, and that he knows the persons so served to be the ones mentioned and described in the summons as J. E. Tindal and J. R. Boyles, the defendants therein; and the deponent is not a party to the action.

JOHN A. BARRE.

Sworn to before me this 13th day of February, 1893.
[SEAL.] ROB'T W. SHAND,
Not. Pub. for S. C.

Filed 13th Feb'y, 1893.

Answer of J. E. Tindal.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

The defendant, J. E. Tindal, above named, answering the complaint herein, says:

For a first defense.

That this defendant denies each and every allegation in the said complaint contained.

For a second defense.

First. Further answering, this defendant, for a second defense, says that on the 20th day of February, A. D., 1892, designated in the said complaint, this defendant was, and has since continued to be, and now is the secretary of state of the said State of South Carolina; that the premises described in the said complaint on the said day were, and have since continued to be, and now are the

property and in the possession of the said State, and in actual public use.

8 Second. That this defendant has no right, title, interest or estate to or in the said premises, of any kind whatever, but that in pursuance of law the same is in the custody of this defendant, as said secretary of state.

MELTON & MELTON,
Attorneys for Defendant J. E. Tindal.

COLUMBIA, S. C., *6th March*, 1893.

Service of a copy of the within answer of J. E. Tindal accepted this day.

LYLES & MULLER,
Plaintiff's Attorneys.

Filed 7th March, 1893.

Answer of J. R. Boyles.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff,
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants.

The defendant, J. R. Boyles, above named, answering the complaint herein, says:

For a first defence.

That this defendant denies each and every allegation in the said complaint contained.

For a second defense.

First. Further answering this defendant, for a second defense, says that on the 20th day of February, A. D., 1892, designated in the said complaint, J. E. Tindal, codefendant herein, was, and has since continued to be, and now is the secretary of state of the said State of South Carolina.

Second. That the said premises are the property of the State of South Carolina; and on the said day and since, have been, and now are, in the possession of the said State, and in actual public use.

9 Third. That this defendant has no right, title, interest or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal as secretary of state, this defendant has been and now is engaged, on behalf of the said State, in watching, guarding and taking care of the said premises.

MELTON & MELTON,
Attorneys for Defendant J. R. Boyles.

COLUMBIA, S. C., *6th March*, 1893.

Service of a copy of the within answer of J. R. Boyles accepted this day.

LYLES & MULLER,
Plaintiff's Attorneys.

Filed 7th March, 1893.

Testimony.

W. H. LYLES sworn.

Direct examination by Mr. MULLER:

Q. You are a practicing attorney in Columbia?

A. I am.

Q. State to the jury what connection you had with the purchase of this hall property—who you represented.

A. I was employed by Mr. Wesley, a resident and citizen of the State of New York, to make the purchase. He arranged for the purchase to be made in the name of J. D. Alexander, of North Carolina, as trustee for him, and I, after seeing the advertisement of the property—the sale was advertised to take place on sales day, in February, 1892, in the city of Columbia, before the court-house door, at public auction—I attended this sale, and bid in this property. It was offered at public auction, David Means, the clerk or agent——

Mr. Melton asks that the witness be cautioned to speak only what he knows.

Q. What position does Mr. Means hold?

A. I have had numerous transactions with the secretary of state, which were conducted by Mr. David Means, who occupies some official position in the office, the office of the secretary of state, in the state-house, in the city of Columbia. Mr. Means was present at this sale, and after some consultation with him as to the terms, etc., the property having been put up, I bid it in, in my own name, as attorney, for $16,135, somethin*h* over $15,000, which I considered the value of the property, knowing the value of real estate in Columbia to be about $18,000 to $20,000, and I think the property is worth now and at the time this action was brought — as it was worth then. I bid in the property, and the paper was prepared; the deed, bond and mortgage *p*ere prepared in the secretary of state's office, and brought to me by Mr. Means.

Q. Where did you get the deed from?

A. I had gotten the deed at that time; the bond and mortgage had been prepared in the office of the secretary of state, and were brought to me for execution. I forwarded——

Q. You say they were sent or brought to you by Mr. Means?

A. The bond and mortgage, prepared for execution, were brought to me by Mr. Means; they bore date the day of sale; I forwarded them to Mr. Alexander, with instructions as to how they were to be executed; they came back to me properly executed, with the exception that the date had been changed so as to conform to the date

of the actual execution of the bond and mortgage. I took them to the secretary of state's office, and conferred with Mr. Means about the matter, and my recollection of the matter is that with Mr. Tindal, the secretary of state, Mr. Means and I together went into the attorney general's office, McLaurin at that time being attorney general, and Mr. Townsend acting as assistant. We submitted the papers to Mr. Townsend, calling attention to the alteration, and he objected to taking the paper in that form on account of the alteration of the date, it being the bond and money for the purchase-money, and it should bear date of the deed, and Mr. Means gave me, from the secretary of state's office, a form of bond and mortgage. I have not seen those papers since that day, and my recollection is not positive on the subject, but my recollection is the new bond and mortgage was prepared by me, we leaving the old bonds and mortgage in the hands of the attorney general, he suggesting some alterations, writing the alterations on the papers themselves. Those papers have been destroyed. The new bond and mortgage were sent on to Mr. Alexander, and were properly executed by him, and when they were executed, I went down to notify Mr. Means that we were ready to comply with the terms of sale, paying over the cash portion of the purchase-money, and delivering the bond and mortgage that
11 were submitted to him; then he went with me to the building itself; we went through it, examined it, and some conversation occurred between him and the occupants of the building, and then, having been joined by Mr. Jacob S. Muller, we went into the State treasurer's office; I had the day bef-re asked Mr. Means if a certified check on the Columbia National Bank of Columbia would——

Mr. Melton objects, as the agency of Mr. Means is not admitted.

We found Mr. Bates there; he said something about the form of the bonds and mortgage; Means and I told him that the bond and mortgage had been drawn up with the exact instructions of the attorney general. I then produced a certified check for one-third of the purchase-money, asked Dr. Bates if he would as leave have that as cash, the money had been deposited the day before in the shape of exchange in the Columbia bank, and was there subject to the payment of the check, and Dr. Bates said he would prefer it to the cash in hand. I gave the certified check to him and the bond and mortgage, and he formally delivered the deed to us. This mortgage provided for the insurance of the property in policies to be assigned to the State. I called their attention to the fact. Mr. Means then, in Dr. Bates' presence, stated the fact there were policies of insurance then upon the property, and if it suited our purpose as well, he would have those policies assigned; he then went out of the office for the purpose of calculating the unearned portion of the premium, I agreeing to pay up the unearned portion of the premium; he came back in a few minutes; I am——

Mr. Melton objects.

I then sat down to the desk of the State treasurer, and started to

write the check to the State treasurer for the amount of the unearned insurance. Mr. Means then said to me that it was not to be paid to the State treasurer, that it had to go into the sinking fund commission. I turned to Dr. Bates, and he assented to the fact, and I directed the check either payable to Mr. Means or to the sinking fund commission. Mr. Means in the meantime prepared, on the delivery of the deed, an order for the possession. Those papers, which I now identify, in the presence of the State treasurer, accompanied the deed, which was formerly delivered by Dr. Bates. We took, Mr. Muller and I took, the receipt executed in duplicate by Dr. Bates and these orders and walked out of the office.

12 Mr. Muller now formerly offers the order in evidence.

Mr. Melton says he has no doubt of the handwriting, but denies the agency of Mr. Means, denies the agency of the secretary of state, and the agency of the treasurer of state.

Mr. Muller reads the order to the jury, and the receipt of Mr. J. W. Alexander.

Q. You say the deed was formerly delivered to you by Dr. Bates?

A. Yes.

Q. After obtaining the deed what did you do?

A. We went out of the office.

Q. Did you demand possession of the property at that time?

—. No; we went out of the office.

Q. At what time did you make the demand of the defendants for the possession of the property?

A. We made demand on the day of the service of the summons and complaint in this action, 13 February, 1893, having prepared the papers; the former action had been commenced and discontinued, and having prepared the papers for this action, I went to the building, and found there the defendant, J. R. Boyles, in possession, and I told him that we were about to commence an action for the possession of the property, and demanded possession, in the name of Mr. Wesley, stating to him that Mr. Alexander had conveyed the property to Mr. Wesley, and offered to exhibit the deed. He told me that it was no use to show him the deed, he had instructions from the secretary of state, Mr. Tindal, to refuse possession, and he would not deliver the possession. I went immediately to Mr. Tindal's office, and found him there, and told him in substance what I had told Mr. Boyle, and stated that Mr. Boyle had refused to deliver the possession of the building or the grounds; that he had ordered him to hold the possession, and Mr. Tindal assented to that, and then I made a formal demand of him, he refused to deliver possession, and said he was required to hold it for the sinking fund commission. We had some further conversation about the matter, and he said he was holding it as secretary of state, and as such would refuse to deliver the possession.

Q. Do you know what position Mr. Means held in the secretary of state office?

A. I have never seen his appointment, I have only known as a matter of public notoriety.

Q. What connection had he with the sinking fund commission?

13 A. This I know: He always transacted the business for the sinking fund with reference to the real estate in its hands as the property of the State.

Q. Who was the secretary and treasurer of the sinking fund commission?

A. I have had repeated transactions with Mr. Means through the sinking fund commission for forfeited lands, I have had transactions with respect to the sinking fund commission before Mr. Means and Mr. Tindall.

Q. In whose handwriting is the deed from Alexander to the sinking fund commission?

A. In the handwriting of D. H. Means who was one of the witnesses to the deed.

Q. I understood you to say that Treasurer Bates was present when Mr. Means handed you these orders for the possession of this property?

A. Yes.

Q. Who handed you the deed itself?

A. Dr. Bates. Means had turned it over to him.

Q. And to whom did you give the bond and mortgage?

A. To Dr. Bates who gave us the receipt for the money, Dr. Bates is the State treasurer for the State of South Carolina.

Cross-examination by Mr. MELTON:

Q. You have states that the deed *for* formerly delivered to you, what do you mean by that?

A. That it was handed over to me.

Q. By whom?

A. By Dr. Bates.

Q. And received by you?

A. Yes.

Q. Please state precisely what occurred, formerly delivered is a conclusion of law, state what occurred, go over it.

A. After Mr. Means and I had been in the Agricultural building we were joined by Mr. J. S. Muller, a brother of Mr. Muller here.

Q. He was concerned with you in the transaction?

A. Yes, at the time associated with me. We went into the secretary of state's office, the day before I had notified them we were ready on that day to settle, and produced the bonds and mortgage, and after some delay in the secretary of state's office, while Means was writing out those orders for possession, we went with him into the office of the State treasurer, who turned over the deed to Dr. Bates, and then we had the conversation which I have related as to the bond and mortgage. Dr. Bates stated at the time something about the form of the bond and mortgage, I told him they had been drawn in exact conformity to the bond and mortgage which had been prepared by the attorney general.

Q. Did you know at the time you bid the property off for whom you were acting?

A. I did.

Q. Did you give the name?

A. No, because Mr. Wesley had reasons, he stated to us why he would prefer it to be brought in the name of some trustee for himself.

Q. When did you give the name?

A. I gave it the day when I got back the first bond and mortgage from Mr. Alexander which had been executed by him.

Q. Did you happen to know at the time the deed was executed by the commissioners of the sinking fund that the name was not there?

A. Yes, I did.

Q. Who filled in the names?

A. I don't know.

Q. Was it not filled in in your presence?

A. I think not, I can tell you in a moment, I think it was filled in by Mr. Means, refers to the deed, yes, it was filled in by Means, the writing is his.

Q. Were you not in the office of the secretary of state and in his presence when the name was filled in, when you gave the name?

A. I am inclined to think that I was present, I have been thinking over the matter but I am not positive.

Q. You do know it was signed by these gentlemen whose names are here without the name of the grantee?

A. Yes, when I first saw that deed it was signed by those gentlemen.

Q. With the name blank?

A. Yes, it was then in the hands of the secretary of state with the name of the grantee blank.

Q. And the name of the grantee was put in by whom?

A. I would not be positive, I saw Mr. Means do it, I know it was put in by him, it was between my interview when I received the bond from Mr. Alexander and the day of its return to me as attorney for Wesley, my impression is that it was filled in the day of my first interview, by Mr. Means.

Q. Do you happen to know that when Means filled it in that the secretary of state was there?

A. My impression is the secretary of state was there the first interview.

Q. That was not the time of the delivery of the deed?

A. No, a week intervened; I had gone off from the city; it required a time to send the new paper up to Lincolnton, N. C., to be executed by Alexander and returned. They came to me two days before they were delivered; I was called away; I received a note from the secretary of state to have the matter closed up. I saw Mr. Means; told him I would be back the next day and would see him about it, and the next day I saw him and made an appointment for the day following.

Q. When you were there and had the transaction to which they

have testified, was the secretary of state there, the delivery of deed you are speaking of?

A. Yes, the deed was delivered in the State treasurer's office; the secretary of state was not there.

Q. He was not in Columbia?

A. I believe he was not.

Q. You did not know him in the transaction?

A. Yes, I knew him all through the transaction, I had repeated conferences with him in Mr. Means' presence about the matter.

Q. Was he there in Columbia at his office or anywhere in Columbia at all the day the transaction was completed?

A. My impression is he was not in the city, but I would not say so positively.

Q. Did you know in the meantime where the deed was?

A. I only know every time I saw it it was in the secretary of state's office.

Q. Locked up in the safe?

A. I don't know.

Q. Where did Mr. Means get the deed?

A. I don't know.

Q. You spoke of Mr. Wesley as a citizen of the State of New York?

A. I have known him for a long time, and only know it in the way I know that you are a citizen of the State of South Carolina.

Q. Is it not true that a good many do business in New York and live in the State- of New Jersey and Connecticut?

A. Yes.

Q. Do you know anything to the contrary that he may so have lived?

A. I only know from my knowledge of the fact, which is gained by a personal knowledge of the man, that he is a citizen of the State of New York.

Q. Do you know anything more then when you are in New York you see him there?

A. Yes, I know more than that, I have seen him there and he is weel-known man, and I only know from my own general connection with him and general knowledge.

Q. That is all?

A. Yes, I have never seen him vote.

Q. And so far as you know he may be a citizen of the State of New Jersey?

A. So far as I know he is a citizen of the State of New York.

Q. But you don't know that?

A. I *I* know it to the extent that I know any fact——

Q. That you don't know?

A. Because I have knowledge of the existence of facts that can only be proven, not by ocular demonstration but by general
16 reputation and knowledge, as I know that you are a citizen of Columbia.

Q. You know me mighty well?

A. Yes, and yet I never saw you exercise any of the acts of a citizen.

Q. Nor have you ever seen him?

A. No.

Q. And you can't swear whether he is a citizen of New Jersey of New York?

A. No, I cannot except from the knowledge that I have of him.

Q. You say you took the deed and went out of the office?

A. Yes.

Q. You came back almost immediately?

A. Came back within the space of 3 or 4 minutes.

Q. *When* then took place? I want to know what occurred between you and Mr. Muller on the one hand, and Dr. Bates on the other, when you went out of the room and immediately returned?

Mr. Muller objects and argues his point before the court.

The court directs the jury to withdraw.

Q. You and Mr. Muller went out of the State treasurer's office and almost immediately returned, now, what occurred between the State treasurer on the one hand and Mr. Muller and yourself on the other?

A. We returned within 5 minute*d*, I think within 2 minutes; we called the State treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script, known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage; we demanded no receipt, we demanded nothing.

Q. And it was refused?

A. Yes, the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in the U. S. circuit court in order to test the valid-y of the revenue bond script, was not that the object of the purchase?

A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script, but as to the U. S. circuit court we were not——

Q. Then, when you brought it you did not intend to pay
17 for it in good money?

A. We did, and considered the script as good money.

Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment of it in revenue bond script?

A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market?

A. I don't know.

Q. It has not?
A. I don't know that it has.
Q. Very little, if any?
A. Yes.
Q. You know Alexander?
A. Yes, I have never seen him personally.
Q. You know him as a poor man?
A. Yes.
Q. Had he and Mr. Wesley had no use for this property that you know of, except to create the issue to which you have referred?
A. That was the sole object for which it was purchased, Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.
Q. Mr. Wesley holds a large block of revenue bond script?
A. Yes.

By the COURT:

Q. The transaction of the sale had been completely?
A. Yes, we had taken the formal delivery of the deed, and had delivered the bond and mortgage and taken the receipt, put it in our pocket and went out of the room, then came back and told Dr. Bates that we had the privilege of anticipating the payment——
Q. And you exercised that privilege under the advertisement, and not under the terms of the sale?
A. Yes, and we called his attention to the fact that it provided for our right to force the payment.

Judge Simonton rules the testimony out so far as Mr. Lyles is concerned.

Jury returns.

Mr. Muller offers in evidence the certified copy of the minuted of the sinking fund commissioners.

Objected to by Mr. Melton.

The court rules that that is not the best evidence, and that the certified copy cannot be admitted, objections being sustained and exceptions noted.

Mr. Muller offers in evidence the mortgage recorded in the R. M. C. O., of Richland county, 11th March, 1892.

18 It is admitted by defendant's counsel that Mr. Wesley is a citizen of New York.

It is admitted that Mr. Tindal and Mr. Boyle are citizens of the State of South Carolina.

Mr. LYLES recalled by Mr. MULLER:

Q. State again the conversation you had with Mr. Tindal.
A. On the day this action was commenced, before we put the papers in the hands of the deputy marshal for service, I went down to the building itself, I found Mr. Boyle, the defendant, in posses-

sion of the building, and I told him I had come down to demand possession of the building. He told me he was there in the custody of the building, under the instructions of the secretary of state, and that he was instructed not to give up the possession of the building to me, and I would have to see the secretary of state. I went immediately to his office, having had some trouble in the first case about the matter, and I told him of my conversation and Mr. Boyle's statement to me that he was holding the property under the instructions of the secretary of state. He said he had stated the matter correctly, that he was instructed by the commissioners of the sinking fund to hold that property as the property of the State of South Carolina, and he couldn't give the possession of the property to me, that he held it as agent of the board of the sinking fund commissioners for the State of South Carolina.

Cross-examination by Mr. MELTON:

Q. Did you take any demand on any of the tenants of the buildings?

A. I could not go into the building.

Q. That is not the question, did you make any of Mr. Boyden?

A. No.

Q. Nor of any one else?

A. Of no one except Mr. Boyle, who I found at the front door of the building; he told me he had instructions to guard the building.

Plaintiffs rests here.

Mr. Melton enters a motion for a nonsuit which is argued before Judge Simonton.

The court rules as follows:

The object and purpose of this suit is the obtaining possession of a certain tract of land in the city of Columbia. The plaintiff not being actually in possession of the land, is obliged to show that he has in himself such titles as warrants a possession. For that purpose he has introduced testimony that he holds title under the State, and in the same testimony he offers evidence that he has demand under that title was refused upon the ground that the parties were holding by virtue of the State, *but* parties referring their claim to the same source, and the motion for nonsuit is overruled.

The defendants read the following depositions of George K. Wright, Capt. Samuel W. Rohan, D. Gambrill, N. W. Campbell.

Testimony.

JAMES E. TINDAL sworn.

Direct examination by Mr. MELTON:

Q. You are secretary of the State?

A. Yes.

Q. Have you any connection with the commissioners of the sinking fund?

A. Yes, I am agent of the sinking fund.

Q. To what purpose?

A. As to certain forfeited lands, vacant lands, and also as to the abandoned lands indirectly.

Q. Are you agent for lands which are not rented, or lands in possession belonging to the State outside of the jurisdiction of the commissioners of the sinking fund?

Question objected to.

Q. Have you taken possession of the lands, which under the general statutes are placed in your custody?

A. I have.

Q. Was the Agricultural Hall building one of those buildings in your possession?

A. Yes, in 1890 after the act was passed transferring this property to the agricultural college and authorizing its sale, when Mr. Butler moved out I took it in charge and custody, as I did also the government mansion and all other like property.

Q. What was the nature of your possession, did you live on the place?

A. No, I simply took charge of it to preserve it.

Q. What did you do with the property when you had it in possession.

A. I took charge of it, put a guard there and tried to rent out portions of it, and used the money to repair the building with, protecting the roof, etc.

Q. Whose money did you use in the repairs?

A. We generally obtain some money for renting portions of it out, and used the money so obtained.

Q. Was it your own individual money?

A. No.

Q. Have you any interest in that building or lot upon which it is placed?

A. Not individually.

Q. Have you ever claimed any interest in it?

A. No.

Q. What position does Mr. Boyle, your codefendant, what position has he in reference to that building?

A. He is the guard there, I employed him to guard and protect the building, as I did guard at the State house and the governor's mansion, when the governor is not there.

Q. What do you call him?

A. He is watchman.

Q. Does he live on the place?

A. No.

Q. Was there any one at the time of the alleged deed to Alexander, was there anybody in that building at that time?

A. Yes.

Q. Who was there?

A. The railroad commissioners had their rooms there, and I had engaged two rooms to Mr. Boyden, editor of a paper, for which he paid $2.00 a month, each, and the Weather Bureau had their office in the building; I found them there when the building came into my possession, and I did not remove them, they are there yet.

Q. Since that time how is that building used?

A. Those same parties I have mentioned are there, and a little later on the dispensary was established in that building, I think that was some time in the spring of last year. Mr. Traxler, who is the State dispenser, has his office there, and the liquors belonging to the State.

Q. Do you know David H. Means?

A. I do.

Q. Do you know who he is employed by?

A. Me.

Q. How long has he been in your employment?

A. Since I have been secretary of state.

Q. When was that?

A. 1890.

Q. What are his duties in reference to his employment by you?

A. I have distinct duties as secretary of state and agent of the sinking fund; he is my chief clerk as agent of the sinking fund and book-keeper, and in addition the monies coming into the office are deposited in the bank by him; he keeps all the money accounts; he is the chief clerk and book-keeper of the agent of the sinking fund.

Q. What do you do as agent of the sinking fund?

A. A good many duties; all the lands that are forfeited to
21 the State we endeavour to collect the taxes on, and we rent out the vacant lands, and collect the rents, and as agent of the sinking fund we send a man and take possession of those lands under the new law.

Q. I understand you, therefore, to say that you are only the custodian of the Agricultural Hall, and you have never been actually in possession thereof; you have never lived on the place?

A. No.

Q. Do you remember the time of the alleged sale to J. W. Alexander of the Agricultural Hall?

A. I recollect when the hall was sold, but it was not to him directly at that time, it was only afterwards his name came in.

Q. State your connection, if any, with that sale to J. W. Alexander?

A. A law was passed by the legislature at that time authorizing the sale of this building by the commissioners of the sinking fund, the money to go to Clemson college. I was trustee of that college, and much interested in it. The commissioners of the sinking fund held a meeting and discussed the matter of the sale of the hall, and at first they decided——

Q. Who called that meeting?

—. Just after the legislature adjourned or passed this act the board of the commissioners of the sinking fund were together, and discussed

this matter as to whether it should be sold, but not until it should bring $20,000.

Objected to.

In consequence of that meeting the hall was advertised; I think it was in October, 1891, but it did not bring a bid sufficient to justify a sale, and therefore it was bid back by the State officers. The next year it was advertised in January, and put up and sold on the first of February, but at that time it had been agreed that the bid of $20,000 should be withdrawn, and a bid of $16,000, as much as we could get, and as soon as a purchaser could be found who would give that it would be advertised again in January to be sold in February. The sale took place on the first of February.

Q. Who conducted that sale?

A. I sent Mr. Means, the chief clerk, down there to conduct the sale, and I also went down myself, and got there a little after the advertisement was read, and while the bidding was going on I was present, but Mr. Means conducted the sale under my orders.

Q. Were any of the commissioners of the sinking fund present at that sale?

A. Not one.

Q. Who appointed the day upon which the sale should be made?

A. I appointed it.

22 Q. Who gave the advertisement to the papers?

A. I did, or had the advertisement written out, and gave it to Mr. Means, the chief clerk.

By the COURT:

Q. You advertised that property for sale in October, and you withdrew it, and you advertised it again in January, and then sold it?

A. Yes.

Q. And you were present although Mr. Means, your clerk, was conducting the sale?

A. Yes.

By MELTON:

Q. In what capacity did you make the first advertisement and the second, and watch the conduct of the sale?

A. In this way: The board had an informal —, agreeing to sell, and authorized me to put up the building and sell if I could get $20,000; afterwards they found that bid was higher than the property would bring, and as the college was in need of the money, they placed it at $16,000, which Mr. Duncan agreed to give for it. We had the property advertised in January, the sinking fund commissioners had an informal meeting in the governor's office, and they authorized me to sell it.

Q. You speak of an informal meeting?

A. The regular meetings of the board were once a month in my office, as secretary of the state, but all the members of the board were not in the city, and it was deemed advisable to have this property

advertised. I asked the members of the board present in the city, the majority of the board, to meet in the governor's office, and sanction my sale of the building; it was not at a regular meeting of the board.

Q. Is it not a rule that notice is to be sent out whenever a meeting of the board is to be called?

Objected to; objection overruled.

A. Yes, the rule is this, that I sent out or required the clerk to notify each member of the board when the regular meeting takes place; maybe it is necessary to postpone that meeting a week, or perhaps it may not be a week, but they are always notified.

Q. Were they notified of this meeting?

A. Only in the informal way I have stated.

Q. Some were not in Columbia at the time?

A. No.

Q. Were they notified there was to be a meeting?

A. No; the chairman of the ways and means committee of
23 the house and the chairman of the ways and means committee of the senate did not live in the city.

Q. Had Mr. Means any official connection with the sale of the Agricultural Hall?

A. No; simply at our request; I sent him down to conduct the sale.

Q. Tell the court and jury what you know in reference to the deed, alleged deed, made by the commissioners of the sinking fund to Alexander, in reference to its execution and delivery?

Objected to as too general.

Objection overruled.

A. At the sale the land sold; Mr. Duncan bid, but Mr. Lyles bid over, and he told me he did it as attorney, and when the deed was to be made, the attorney general was not present, and I requested the assistant attorney general, Mr. Townsend, to see that the deed was properly prepared. The deed was then prepared, without the name; Mr. Lyles still did not give the name of the purchaser; we had it put down to him as attorney. When the board of the commissioners of the sinking fund met I explained to them the transaction, and turned over to them the deed, without the name, and explained what had been done. Then it was in their possession; the- discussed the matter, and signed the deed, and left it upon the table, and I said to Mr. Means you must lock that deed in the safe, consideration has not been paid, and he did so.

Q. What became of the deed?

A. It was locked up in the safe in my office. About a week after that, I would not be possitive as to the time, Mr. Lyles came into the office with the mortgage; it was date- North Carolina, and I declined to receive that until we saw Mr. Townsend, and he said it did make a difference about the way the mortgage was drawn, and therefore the paper had to be returned or prepared over. Mr. Lyles came in again some time after that, or even that day perhaps, while

we were discussing the matter of the mortgage, which had to be referred to Mr. Townsend; the deed had been brought out there by Mr. Means, and placed back in the safe, after the mortgage had to be sent back. When Mr. Lyles returned the second mortgage, in accordance with the law as Mr. Townsend required, I was away from the city, and do not know what transpired afterwards.

Q. To your knowledge did the commissioners of the sink-
24 ing fund ever have that *deed* in their possession after they laid it on the table at that meeting?

A. Not that I know of. I have two safes in my office, one for the papers and money of the sinking fund and the other for the secretary of state's papers, this was locked up in the safe of the commissioners of the sinking fund, and so far as I know it remained there until it was taken out of there when I was away from Columbia.

Q. You know nothing further in reference to that deed?

A. After that I know nothing of my personal knowledge.

Q. Did you arthorize, before you left home, any disposition of that deed?

A. No.

Q. Did any member of the fund to your knowledge authorize any disposition of it?

A. No.

Q. Who appointed the day and the terms upon which the property should be sold, in other words, who acted in all this matter in carrying out the authority of the sinking fund, if any authority had been given?

A. As I stated, at the informal meeting they authorized me to sell the property, and I calculated the time it had to be advertised and appointed the day accordingly.

Q. You were there present at the sale?

A. Yes.

Q. Who directed the sale itself?

A. Mr. Means.

Q. As auctioneer?

A. No, the auctioneer was Mr. Levin.

Q. You say you were authorized to make the sale and you appointed the day upon which the sale should be made; had the advertisement been put in the paper, in what way was that authority given to you, in writing or verbally?

A. It was just agreed at this meeting of the board.

Q. Any resolution of the board about it?

A. No formal resolution.

Q. Did you ever authorize the insertion of the name of the purchaser of that land in that deed?

A. I don't recollect that I distinctly authorized it, though it was understood that when Mr. Lyles had brought in the name there would be no objection.

Q. Did you, or any of the commissioners of the sinking fund to your knowledge, authorize Mr. Means to insert the name in the deed?

A. When Mr. Lyles came in there to have the name inserted in

the mortgage he and I got to a discussing the matter of the mortgage, and I don't remember that I authorized Mr. Means to insert it, though I may have assented to it without recollecting it distinctly.

Q. That objection was not made to that mortgage, that was the first mortgage that had to be sent on to North Carolina?

A. That is my recollection, but those things are a little indistinct, but when the deed was signed it was signed without the name, and about a week after that Mr. Lyles came in with the mortgage and brought the man.

Q. Do you know whether you were present when the name was inserted?

A. I can't say definitely about that, I think it was done that same day.

Q. Did you see Mr. Means insert the name?

A. No, I can only say when I suppose it was done, while Mr. Lyles and I were discussing the mortgage.

Q. It is in evidence that a demand was made upon you for the Agricultural Hall property, where was that demand made, if such a demand was made?

A. I think Mr. Lyles came one day into my office and very pleasantly said, you know I have come round to demand the Agricultural Hall, and he presumed that I would not give it up, to which I assented.

Q. Why did you refuse possession of the hall upon the demand?

A. For the reason that the hall, these papers had been exchanged when I was absent, and when I came back I found the governor had interfered and refused to deliver the hall, and it was still in my custody, and that custody had never changed, and it was a question whether Mr. Lyles had any right to it, and I did not give it up on that account as I still had the charge of the building, and I did not believe he had the right under the circumstances.

Cross-examination by Mr. LYLES:

Q. You have testified, in reference to the placing of that deed in the safe, you gave instructions to Mr. Means, when the cash portion of the purchase-money was paid and the bond and mortgage delivered, to deliver the deed in your absence?

A. No.

Q. It was his duty to do so under your general instructions?

A. No.

Q. You have testified of the proceedings of the commissioners of the sinking fund at the time when they met February 2, 1892?

A. That was the day of the sale, they met previous to that.

Q. Yes, but I am asking you now, they met on the 2 Feb., 1892, when they signed the deed?

A. Yes.

Q. I have here what purports to be an extract of the minutes of the proceedings of the meeting, certified to by yourself as correct?

Objected to. Objection overruled.

26 From page 198 of the volume of the minuted of the sinking fund.

Objected to.

Q. Look over that, and see whether that is right?

By the COURT:

Q. You must answer this question from your own memory.

A. I would not undertake to do that when we give certified statements, the only thing I could testify would be this, I believe if my name is signed to any certificate from the records of my office I verify them at the time, I would not attempt to swear to that from memory, I would not attempt to swear to anything that might be in the office from memory, but if I give you a certificate from my office that such and such things are there, I always do that upon verification.

Q. What instructions were given to you by the board, after it was signed, and after it was placed in your possession?

A. It was understood that when this deed was proven it was to be delivered, but at that time there was no special resolution of instruction given, because the thing was incomplete.

Q. Was not this deed delivered by the board to the Hon. J. E. Tindal (indicating)?

A. That was understood, no formal resolution to that effect. I think the secretary in writing off that says what he presumes to be the action of the board, that is my recollection, but there was no formal action of the board taken.

By the COURT:

Q. Do you know anything about the payment of the cash portion of this purchase-money?

A. No.

Q. You never had it in your possession?

A. No.

Testimony.

Dr. W. T. C. BATES sworn.

Direct examination by Mr. MELTON:

Q. You are State treasurer of South Carolina?

A. Yes.

Q. Have you any office in the sinking fund commission?

A. Yes, as I understand, in the act of 1883, I am the treas-
27 urer of the sinking fund, also a member of the sinking fund, and also, by election, the treasurer of the sinking fund.

Q. When were the original meetings of the board held?

A. Second Tuesday in each month.

Q. How were those meetings called?

A. I will state that Mr. Means acted as clerk for me.

Q. By whose appointment?

A. By my own appointment with the consent of the commissioners. It is his custom to send out for me the notices to the members in the week or ten days before the meeting.

Q. No direction is needed for the regular meeting?

A. No.

Q. For any special meeting who would direct the call?

A. The governor, who as chairman of the board, has power to call any special meeting.

Q. Who are the members of the board?

A. The governor of the State, *ex officio* chairman, the attorney general, and comptroller general and the chairman of the ways and means committee of the senate and the house.

Q. Do you remember the names of those not regular officers of the State?

A. I think D. E. Finley, of New York, was the chairman of the ways and means committee, W. D. Evans the chairman of the finance committee of the senate.

Q. Were you present at the sale?

A. No.

Q. Did you go to the meeting when the deed was signed?

A. No, I was not in the city of Columbia when that meeting was held. I did not sign the deed.

Q. Are you a member of the commission of the sinking fund?

A. Yes, but not having been present at the meeting when the deed was signed, I did not sign it.

Q. Tell the court and jury what connection you had with the sale of that property, or with the delivery of the deed or the alleged deliver-.

A. I remember that some time in January, I can't remember the day, Mr. Tindal, I think, came to the treasurer's office and asked those of us members of the board present to meet at the governor's office to take some steps to bring about the sale of the Agricultural Hall. My recollection is that the governor, myself, the attorney general and the comptroller general were present. The sale had been delayed. The act requiring it to be sold was passed, I think, in 1890, and I think this was January, 1892, and we agreed to have the property advertised and sold on the first Monday in February, and we verbally gave Mr. Tindal as agent of the sinking fund, he had authority from the four of us to sell it.

28 Q. Were there any specific directions to Mr. Tindall?

A. I don't know that there were.

Q. Did you dictate any of the terms of sale at all?

A. I don't remember any formal directions being passed; usually when we have those meetings, Mr. Means who does the clerical work, is present, but he was not present. I don't believe there was any specific direction in the nature of an agreement that the sale should take place.

Q. Mr. Lyles has testified, calling on you as State treasurer, I wish you would tell the jury what occurred after the sale, when we called on you.

A. As well as I recollect, and I think my memory is correct and clear, about the 16th of February I was in the State treasurer's office, and Mr. Wm. H. Lyles and Mr. Jacob Muller came into the treasurer's office with Mr. Means, and Mr. Means had in his hands a paper, which proved to be the papers alluding to this sale, the bond and mortgage and the title as well as I remember, I suppose the same title which was produced here in court, and Mr. Lyles wanted me to accept the payment of the cash portion of the purchase and pass the papers, and never having been called upon to do anything of that kind before, though I have been a member of the sinking fund commission since 1890, I objected as not having been present at the meeting of the board when the title was prepared, and objected also on account of the absence of the secretary of state and attorney general, neither of them were present in the city at the time. My attention was called to the fact that under the law the bond and mortgage securing the credit portion of the purchase was made payable to the State treasurer. I thought very probably I might act in the matter, Mr. Lyles seemed very anxious I should so so, I hesitated, and mentioned again the absence of the attorney general, whose duty it was to state to the board, or some member of the board, that these papers were all correct and regular. Mr. Means, I think, told me that some alterations had been made in the papers, and he thought them all right. Not suspecting any trick, I accepted the check from Mr. Lyles, and he insisted and got me to do what I never had done before, to issue an official receipt, usually the money that comes into my hands as treasurer of the sinking fund comes through the agent of the sinking fund, and I receipt to him and deposit it to the credit of the regular account, the credit of the sinking fund. I don't remember after my objections were overcome, I looked to Mr. Lyles and Mr. Muller, I had confidence in them and believed the transaction was straight;
29 I accepted the check and gave him my receipt, and I have the check in my pocket, I don't remember a formal delivery of the deed, I remember the proceeding was rather informal, I remember we handled the papers, first one then another, I was aware of the fact that Mr. Lyles had the deed, I don't remember formerly handing him the deed.

Q. Was that check ever cashed or even taken to the bank?

A. No.

Q. You never received the money on that check?

A. No.

Q. Was there any attempt at that time to pay the cash portion in any other way except by cash?

A. Yes.

Q. What was done in reference to it?

A. The cash portion under the act could all be paid in cash—he offered to pay me $\frac{1}{3}$ cash provided for in the sale in the form of a certified check, which I agreed to take.

Q. Had the commissioners of the sinking fund ever given you authority to collect money either as member of the board or as trustee for the sale of this Agricultural Hall?

A. No.

Q. You never had authority to collect money for them?

A. I always felt by the authority of my office that I was responsible for the money that came into my hands, usually it is collected by the agent of the sinking fund and turned over to me, and I give the receipt.

Q. Had Mr. Tindal ever authorized you to collect the money for the sinking fund?

A. No.

Q. Did you present the check at all?

A. No.

Q. Was any other tender made to you at that time for the cash portion?

A. I can't say, the tender of the $\frac{1}{3}$ was made to me in the form of a certified check, I understand Mr. Melton to ask if that $\frac{1}{3}$ was tendered in any other form, that was entirely acceptable to me, I did not demand the actual money.

Judge Simonton rules that when the cash portion was tendered in this form and the bond and mortgage were given and the deed was delivered that that terminated that transaction, and that nothing that occurred subsequent to that action can be brought into evidence here, as we are discussing the validity of this sale.

Q. I understood you to say that you made no formal delivery of that deed?

A. Not that I remember.

Q. Were you ever authorized to make any delivery of that deed?

A. No.

Q. Was it ever placed in your hands in escrow or any other way?

A. No, except as I stated, it was brought to me by Mr. Means accompanied by Mr. Lyles and Mr. Muller.

Cross-examined by Mr. LYLES:

Q. That check you have testified to was certified by Capt. Wylee Jones, cashier of the Columbia National bank?

A. Yes.

Q. Was it a perfectly solvent bank?

A. Yes.

Q. And is your State depository?

A. One of them.

Q. The check calls for the payment of how much?

—. That was the amount of the cash portion of the purchase-money.

Q. That is the amount as is mentioned in your receipt given?

A. It is.

In Reply.

Q. Do you know of your own knowledge if the amount mentioned in this receipt was the cash portion for which the property sold, or do you know from what somebody told you?

A. I only compared the check with the papers brought to me, I was not officially informed except by the parties who brought all the papers to me.

Trial of Cause.

At a stated term of the circuit court begun and holden at Charleston, S. C., in the district aforesaid, on the 4th day of April, 1894, this case came up for trial before the following jury which was selected, organized and sworn, to wit: J. M. Prioleau, foreman, Phillip Riley, Israel Ottalengui, Warren D. Hamlin, Perry Halfacre, J. M. Elliott, Charles Trenholm, Jessie Truesdale, C. W. Caldwell, Cleland Williman, J. L. Courtney and J. B. Larrisey. The pleadings were read to the court and jury, and the testimony taken by consent of counsel was also read. The following witness was sworn and examined on behalf of the plaintiff, to wit: W. H. Lyles.

The defendants made a motion for a nonsuit. After hearing arguments of counsel the court refused to grant a nonsuit. The following witnesses were sworn and examined on behalf of the defendants, to wit: J. E. Tindal, secretary of state; W. C. T. Bates, State treasurer; James G. Gibbes and David H. Means. Arguments were made by Mr. Muller on behalf of plaintiff and by Mr. Buchanan, attorney general, and Mr. L. D. Melton on behalf of defendants, and by Mr. Lyles and Mr. Muller in reply on behalf of plaintiff.

31 The court charged the jury and they retired and considered the case and returned into court with the following verdict:

"We find for the plaintiff the possession of the land in dispute as described in the complaint.

J. M. PRIOLEAU, *Foreman.*"

April 7th, 1894.

Judgment.

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, Plaintiff, }
vs. }
J. E. TINDAL and J. R. BOYLES, Defendants. }

This action having been brought to a trial at a circuit court held on the 4th day of April, A. D. 1894, before Judge Charles H. Simonton and a jury, and a verdict for Edward B. Wesley, the plaintiff, against J. E. Tindal and J. R. Boyles, the defendants, having been rendered therein by the jury on the 7th day of April, 1894, for the possession of the real estate in dispute, and described in the complaint therein as follows—to wit: All that lot, piece or parcel of land sit-

uate in the city of Columbia, county of Richland, and State of South Carolina, containing one-quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the north by land now or late of the estate of McAndrew; on the east by Richardson street; and on the south and west by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated 3rd day of May, 1875, and recorded in Book K of Deeds, pp. 106 and 107. Also all that certain parcel or lot of land situate, lying and being in city of Columbia and State aforesaid, containing about one-eighth of an acre of land, bounded north by the "Agricultural Hall" building and lot immediately in rear thereof; east by Richardson street; south by lot now or formerly of Jacob C. Lyons; and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker; said lot being a rectangular parallelogram in shape, and measuring on Rich-
32 ardson street from the southeastern corner of the said Parker Block building south twenty-six feet, and from east to west two hundred and eight feet; the said lot also joining a part of the Agricultural Hall block, and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated December 11th, 1875, and recorded in R. M. conveyance office for Richland county, in Book K of Deeds, pp. 319 and 320; the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Johnston, dated April 9th, 1883, and recorded in R. M. conveyance office in Book P of Deeds, &c., p. 87; and the costs having been adjudged at fifty-three and $\frac{35}{100}$ dollars.

Now, on motion of Messrs. Lyles & Muller, attorneys for said Edward B. Wesley, plaintiff, it is adjudged—

That Edward B. Wesley, plaintiff, do recover of the defendants, J. E. Tindal and J. R. Boyles, the possession of the real property described in the complaint herein.

And further, that he recover of the said defendants the sum of fifty-three and $\frac{35}{100}$ dollars costs of this action.

LYLES & MULLER,
Plaintiff's Attorneys.

Signed, sealed, and entered this 7th day of May, 1894.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed May 7th, 1894, at 12 o'clock m.

Execution.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, Plaintiff, }
vs.
J. E. TINDAL and J. R. BOYLES, Defendants. }

To John P. Hunter, Esq., United States marshal, or his lawful deputies, Greeting:

Whereas, judgment was rendered on the — day of May,
33 one thousand eight hundred and ninety-four, for an action in the circuit court of the United States for the district of South Carolina, between Edward B. Wesley, plaintiff, and J. E. Tindal and J. R. Boyles, defendants, in favor of said Edward B. Wesley, plaintiff, against the said J. E. Tindal & J. R. Boyles, defendants, for the recovery of the possession of the following-described real estate, to wit: All that lot, piece or parcel of land situate in the city of Columbia, county of Richland, and State of South Carolina, containing one quarter of an acre, more or less, with the buildings and improvements thereon, known as "Agricultural Hall" (formerly known as "Parker's Hall"), bounded on the north by land now or late of the estate of McAndrew; on the east by Richardson street; and on the south and west by lands now or formerly of Jacob C. Lyons, said lot of land being the same lot of land conveyed to Thomas B. Johnston by Jesse E. Dent, sheriff of Richland county, by deed dated 3rd day of May, A. D. 1875, and recorded in Book K of Deeds, pp. 106 & 107; also all that certain parcel or lot of land situate, lying and being in the city of Columbia, and State aforesaid, containing about one-eighth of an acre of land, bounded north by the "Agricultural Hall" building and lot immediately in rear thereof; east by Richardson street; south by lot now or formerly of Jacob C. Lyons; and west by lot of Maurice S. Parker, or rather by lot formerly of Maurice S. Parker; said lot being a rectangular parallelogram in shape, and measuring on Richardson street from the southeastern corner of the said Parker Block building south twenty-six feet, and from east to west two hundred and eight feet; the said lot also adjoining a part *a part* of the "Agricultural Hall" block and being the same lot of land formerly conveyed to Thomas B. Johnston by Asher Palmer, of Columbia, in said State, by deed dated Dec. 11th, 1876, and recorded in R. M. conveyance office for Richland county in Book K of Deeds, pp. 319 & 320; the above-described two lots of land being the same conveyed to the State of South Carolina by deed of T. B. Jonston dated April 9th, 1883, and recorded in R. M. conveyance office in Book P of Deeds, &c., p. 87; and also for the sum of fifty-three and $\frac{35}{100}$ dollars costs and charges therein, as appears to us by the judgment-roll filed in the office of the clerk of the said court:

And whereas, the sum of fifty-three and $\frac{35}{100}$ dollars costs and charges as aforesaid are now actually due thereon:

34 Therefore we command you that you deliver the property to the said Edward B. Wesley, plaintiff, and that you satisfy the said sum of fifty-three and $\frac{35}{100}$ dollars costs and charges aforesaid out of the personal property of the said judgment debtor within your district belonging to the said judgment debtors on the day when the said judgment was so docketed in your district, or at any time thereafter, in whose hands soever the same may be, and duly return this execution, according to law, to the clerk of the said court, at Charleston, S. C.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., the 7th day of May, one thousand eight hundred and ninety-four.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

LYLES & MULLER,
Plaintiff's Attorneys.

John P. Hunter, U. S. marshal for said district, levy and collect $53.35 with interest from the 7th day of May, 1894, besides your fees, &c.

LYLES & MULLER,
Attorneys for Judgment Creditors.

Attorney	$20 00
Clerk Hagood	20 35
Marshal Cunningham	13 00
	$53 35

Entered in execution docket, fol. 92, this 7th May, 1894.

J. P. HUNTER,
U. S. Marshal.

Filed 7th May, 1894.

Order Extending Time to File Bill of Exceptions.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

EDWARD B. WESLEY, a Citizen of New York,
vs.
J. E. TINDALL and J. R. BOYLES, Citizens of the State of South Carolina.

35 The attorney for the defendants having given notice of exceptions to the rulings of the trial judge, on the admission of testimony in the cause, on the motion for a nonsuit and on the plea to the jurisdiction of the court,

Ordered: That they have until the first day of August, 1894, to make and file their bill of exceptions with the clerk of this court.

CHARLES H. SIMONTON,
Circuit Judge.

2nd May, 1894.
Filed 2nd May, 1894.

Bill of Exceptions.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff, }
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants. }

On appeal to the United States circuit court of appeals, sitting at Richmond, Virginia, for the fourth circuit.

Defendants' Bill of Exceptions.

First.

Be it remembered, that during the progress of the trial *of* the court excluded the following testimony of W. H. Lyles, a witness examined on behalf of the plaintiff, while under cross-examination by the attorneys for the defendants on the ground that the said testimony was incompetent and irrelevant.

The testimony thus excluded is as follows:

Q. You and Mr. Muller went out of the State treasurer's office and almost immediately returned, now what occurred between the State treasurer on the one hand and Mr. Muller and yourself on the other?

A. We returned within five minutes, I think within two minutes. We called the State treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate of it at any time, and we
36 told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script, known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing.

Q. And it was refused?

A. Yes, the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in

the United States court, in order to teste the validity of the revenue bond scrip, was not that the object of the purchase?

A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script, but as to the United States circuit court we were not——

Q. Then when you bought it you did not intend to pay for it in good money?

A. We did, and considered the script as good money.

Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment of it in revenue bond script?

A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market?

A. I don't know.

Q. It has not?

A. I don't know that it has.

Q. Very little if any?

A. Yes.

Q. You know Alexander?

A. Yes, I have never seen him personally.

Q. Do you know him as a poor man?

A. Yes.

Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred?

A. That was the sole object for which it was purchased, Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond script?

A. Yes.

To this ruling the defendants, by counsel, excepted and offered this their first bill of exceptions, and prayed that it be signed, sealed and made a part of the record, which is accordingly done.

CHARLES H. SIMONTON, [L. S.]
Circuit Judge.

37 Second.

Be it remembered that at the close of the testimony in this case the defendants entered a motion to dismiss the complaint on the plea to the jurisdiction of the court contained in the second defenses set up in the answers of the defendants herein, and on the evidence introduced to sustain the plea. The defendants contended that they were mere custodians and care-takers of the premises, not in possession or having any interest therein, and were not proper parties to the suit; and that this cause was in effect a suit against the State of South Carolina. The court overruled the motion to dismiss the complaint, and held that this cause was not in effect a suit against the State of South Carolina, and that the defendants were proper parties; and that the court had jurisdiction.

Thereupon, the defendants, by their counsel, at the time excepted

to the ruling of the court; and tendered this their second bill of exceptions, which they prayed may be signed, sealed and made a part of the record, which is accordingly done.

CHARLES H. SIMONTON, [L. S.]
Circuit Judge.

Filed 24th July, 1894.

Assignment of Errors and Petition for Writ of Error.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

EDWARD B. WESLEY, a Citizen of the State of New York, Plaintiff, }
vs.
J. E. TINDAL and J. R. BOYLES, Citizens of the State of South Carolina, Defendants. }

To the honorable circuit court of the United States for the district of South Carolina:

The defendant- above named, by counsel, respectfully assign the following errors to the judgment rendered in this cause, and to the rulings of the presiding judge during the progress of the trial.

38 I.

That the court erred in excluding the testimony of W. H. Lyles, a witness examined on behalf of the plaintiff, while under cross-examination by the attorneys for the defendant-, which said testimony is as follows:

Q. You and Mr. Muller went out of the State treasurer's office and almost immediately returned; now what occurred between the State treasurer on the one hand, and Mr. Muller and yourself on the other?

A. We returned within five minutes, I think, within two minutes. We called the State treasurer's attention to the fact, that the bond which had been delivered by us for Alexander contained a clause which authorized him to participate of it at any time, and we told him on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond script, known as the Blue Ridge Railroad script, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date, up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing.

Q. And it was refused?

A. Yes; the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in the United States circuit court, in order to test the validity of the revenue bond script? Was not that the object of the purchase?

A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond script; but as to the United States circuit court, we were not——

Q. Then when you bought it you did not intend to pay for it in good money?

A. We did, and considered the script as good money.

Q. When you made the purchase you made it with a view of compelling the State to take the deferred payment of it in revenue bond script?

A. Yes.

Q. Did you happen to know whether the revenue bond script had any value in the market?

A. I don't know.

Q. It has not?

A. I don't know that it has.

Q. Very little, if any?

A. Yes.

Q. You know Alexander?

A. Yes, I have never seen him personally.

39 Q. Do you know him as a poor man?

—. Yes.

Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred?

A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond script?

A. Yes.

II.

At the close of the testimony introduced by the plaintiff the defendants entered a motion for a nonsuit, on the grounds that no evidence was introduced by the plaintiff showing or tending to show in the plaintiff title by grant from the State, or such possession, either in plaintiff or his predecessors or grantors, as would warrant the presumption of a grant from the State; and no evidence showing or tending to show a source of title common to both plaintiff and defendants.

And these defendants assign error in the presiding judge in overruling this motion for a nonsuit.

III.

In his answer to the complaint in this action the defendant, J. E. Tindal, entered a plea to the jurisdiction of the court, as follows:

For a second defence.

First. Further answering, this defendant, for a second defence, says: That on the 20th day of February, A. D. 1892, designated in the said complaint, this defendant was, and has since continued to be, and now is, the secretary of state of the said State of South Carolina; that the premises described in the said complaint on the

said day were, and have since continued to be, and now are the property and in the possession of the said State, and in actual public use.

Second. That the defendant has no right, title, interest or estate to or in the said premises of any kind whatever, but that, in pursuance of law, the same is in the custody of this defendant, as said secretary of state.

That in his answer to the complaint in this action the defendant, J. R. Boyles, entered a plea to the jurisdiction of the court, as follows:

40 For a second defence.

First. Further answering, this defendant, for a second defence, says: That on the 20th day of February, A. D. 1892, designated in the said complaint, J. E. Tindal, codefendant herein, was, and has since continued to be, and now is, the secretary of the said State of South Carolina.

Second. That the said premises are the property of the State of South Carolina, and on the said day and since have been and now are in the possession of the said State, and in actual public use.

Third. That this defendant has no right, title, interest or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal, as secretary of state, this defendant has been and now is engaged on behalf of the said State in watching, guarding, and taking care of the said premises.

The uncontradicted testimony is to the effect that the said J. E. Tindal is now and was at the times mentioned in the complaint the secretary of state of the State of South Carolina. That he had charge and custody of the said premises, by virtue of his office as secretary of state, who is under the laws of the said State the custodian of all public buildings belonging to the said State, situated in the city of Columbia. That he employed the defendant, J. R. Boyles, as watchman, to guard the property and protect the building here in dispute; that neither of them had any interest in the property, derived no income therefrom, and did not live thereon. That the said defendants had and claimed to have no right, title, interest or estate of any kind whatever in or to the said premises. That the said premises were not in their possession, but on the contrary the greater portion thereof was in the possession of the State in use for public purposes, a small portion thereof being occupied by tenants of the State of South Carolina.

After the evidence was closed these defendants entered a motion to dismiss the complaint on the said plea, and the facts of the case as hereinbefore stated, on the ground that the defendants were mere custodians and care-takers of the said premises, not in possession or having any interest therein, and that this action was in effect a suit against the State of South Carolina.

The court overruled the motion to dismiss, and these defendants assign error in the court in so doing.

41 Wherefore, for these and other errors apparent in the rendition of said judgment, and in the rulings of the court, these

defendants, by counsel, pray a writ of error and supersedeas to said judgment, that the same may be allowed, and that a transcript of this record and proceed*ceed*ings, and papers in this cause, duly authenticated, may be sent to the circuit court of appeals for the fourth circuit, sitting at Richmond, Va.

And your petitioners will ever pray, etc., etc.

J. E. TINDAL,
J. R. BOYLES,
By their counsel, MELTON & MELTON.

Filed 9th July, 1894.

Supersedeas Bond.

Know all men by these presents, that we, J. E. Tindal, J. R. Boyles, as principal-, and B. R. Tillman and W. D. Mayfield, as sureties, are held and firmly bound unto Edward B. Wesley in the full and just sum of four thousand dollars to be paid to the said Edward B. Wesley, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this second day of July, in the year of our Lord, one thousand eight hundred and ninety-four.

Whereas, lately at a circuit court of the United States for the district of South Carolina, in a suit depending in said court, between the said Edward B. Wesley, plaintiff, and the said J. E. Tindal and J. R. Boyles, a judgment was rendered against the said J. E. Tindal and J. R. Boyles, and the said J. E. Tindal and J. R. Boyles having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward B. Wesley, citing and admonishing him to be, and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if the said J. E. Tindal and J. R. Boyles shall prosecute said writ of error to effect and answer all damages and costs if they fail to make
42 their plea good, then the above obligation to be void, else to remain in full force and virtue.

J. E. TINDAL. [SEAL.]
B. R. TILLMAN. [SEAL.]
J. R. BOYLES. [SEAL.]
W. D. MAYFIELD. [SEAL.]

Sealed and delivered in presence of—
D. H. MEANS.
F. M. MIXSON.

Approved:
CHARLES H. SIMONTON,
Circuit Court.

3rd July, 1894.

Filed 9th July, 1894.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Edward B. Wesley, a citizen of the State of New York, plaintiff, against J. E. Tindal and J. R. Boyles, citizens of the State of South Carolina, defendants, a manifest error hath happened, to the great damage of the said defendants, J. E. Tindal and J. R. Boyles, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fourth circuit, together with this writ, so that you have the same at Richmond, on the 2nd day of August next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done
43 therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal of the Court. Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 3rd day of July, in the year of our Lord one thousand eight hundred and ninety-four.

J. E. HAGOOD,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by—
CHARLES H. SIMONTON,
Circuit Judge.

Filed 9 July, 1894.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edward B. Wesley, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 2d of August next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United

States for the district of South Carolina, wherein J. E. Tindal and J. R. Boyles are plaintiff- in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles H. Simonton, judge of the circuit court of the United States, this 3d day of July, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES H. SIMONTON,
Circuit Judge.

44 Service of a copy of within citation accepted this 13th day of July, 1894.

LYLES & MULLER,
Pl'ffs' Att'ys.

Filed July 9, 1894.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Clerk's Certificate.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of all the records and proceedings as agreed upon by counsel in the case of Edward B. Wesley, plaintiff, against J. E. Tindal and J. R. Boyles, defendant-, rendered as aforesaid, together with the verdict and all things relating to the same, as appears by the records now on file in my office.

Seal of the Court. Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., in the district aforesaid, this 26th day of July, A. D. 1894.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

45 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit in the said Cause.*

July 28, 1894.—Record of the circuit court of the United States for the district of South Carolina filed and the case docketed.

September 14, 1894.—Motion of the defendant in error to dismiss the writ of error or affirm the judgment; service of motion acknowledged.

September 26, 1894.—Briefs of defendant in error filed; September 29, 1894, briefs of plaintiff in error filed; October 1, 1894, briefs of plaintiff in error against the motion filed.

October 2, 1894.—Briefs of defendant in error for the motion filed.

October 3, 1894.—Motion of plaintiffs in error to certify questions of law to the Supreme Court of the United States, and Exhibit

46 "Transcript of Record, Supreme Court of the United States, October term, 1894, No. 796. The State of South Carolina, plaintiff in error, *vs.* Edward B. Wesley—filed September 10, 1894," filed.

October 4, 1894.—Motion to certify questions of law to the Supreme Court refused.

October 8, 1894.—Cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel before JJ. Goff, Hughes, and Morris, and submitted.

Afterwards, at the present (February) term, 1895, to wit, February 5, 1895, the court announced and filed the following opinion:

47 United States Circuit Court of Appeals, Fourth Circuit.

J. E. TINDALL and J. R. BOYLES, Plaintiffs in Error, *vs.* EDWARD B. WESLEY, Defendant in Error.	No. 96. In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

(Argued October 8, 1894. Decided February 5, 1895.)

Heard by Goff, circuit judge, and Hughes and Morris, district judges.

Samuel W. Melton and Osmund W. Buchanan, for plaintiffs in error; William H. Lyles, of Lyles & Muller, for defendant in error.

Statement.

On the 16th of February, 1892, the plaintiff below, Edward B. Wesley, through a trustee, purchased from the commissioners of the sinking fund of the State of South Carolina, the lot of ground in the city of Columbia on which stands the building known as Agricultural Hall. The property was sold at public auction, and the purchase price was $16,165. The State of South Carolina had been the owner, and this sale was made in pursuance of an act of her General Assembly. The purchase was made for the plaintiff below by one J. W. Alexander, as his trustee. Alexander fully

48 complied with the terms of sale by paying to the State treasurer, W. T. C. Bates, one-third of the purchase-money, and executing to him his bond and a mortgage of the premises for the residue of the stipulated price, and received a deed for the property in due form, executed by the commissioners of the sinking fund of the State, and delivered by Bates, the State treasurer. In the advertisement of sale, in the bond taken for the deferred instalments of the purchase-money, and in the mortgage securing them, leave was given the purchaser to anticipate the deferred payments at his

pleasure. The deed of conveyance recites that it was made by the commissioners of the sinking fund, by direction and appointment of the plaintiff below, to J. W. Alexander, to hold the same in trust for the use of the plaintiff below, his heirs and assigns forever, and to permit the *cestui qui trust.* to have and possess the same and to enjoy the profits, and in trust to convey the same to him, his heirs and assigns, on request, or to such person as he might direct and appoint. Afterwards, namely, on the 11th day of February, 1893, Alexander did, upon request, convey the lot and premises in fee-simple to him, Edward B. Wesley, who was a citizen of the State of New York. On the 13th day of February, 1893, this suit was brought. The suit is by complaint, and is in South Carolina a statutory action equivalent to and a substitute for the common-law action of ejectment.

One of the provisions of the statute law of South Carolina is as follows: "The secretary of state shall take charge of all the property of the State, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the directions and instructions of the commissioners of the sinking fund." There was no provision of law for other custody of the subject of this suit than that of the secretary of state, J. E. Tindal.

The immediate custody of the building was in a watchman, J. R. Boyles, appointed by Tindal, whose duty it was to "watch, guard and take care of the premises." He is one of the defendants below.

The complaint avers that the plaintiff below was a citizen of New York, sets up his title to the premises in dispute by describing his purchase from the commissioners of the sinking fund and
49 the deeds conveying title to him, which gave him the right of possession, and complains that the defendants below, Tindal and Boyles, wrongfully entered into the premises and ousted him, and have been in possession since his purchase on the 20th of February, 1892, and still are withholding the same from him.

The defendant below, Tindal, for his first answer, denies each and every allegation of the complainant. For his second answer, he says that on the 20th of February, 1892, he was and has since continued to be and is secretary of the State of South Carolina; that the premises described in the complaint were and are the property of and in the possession of the said State in actual public use. For his third answer, he says that he has no right, title, interest, or estate in the said premises of any kind whatever, but that the same are in his custody as secretary of state. The answer of Boyles is similar to that of Tindal, averring that he is in the employment of Tindal as secretary of state, has no title in the premises, and is engaged only in watching, guarding, and taking care of the premises.

The State of South Carolina is not a party to the suit in any form: she did not come into court to make suggestion of her title to the premises in dispute, and for that purpose only, as was done in Kaufman *v.* Lee. She left her relations to the property to be gathered exclusively from the pleadings and the evidence.

Among other testimony taken at the trial was the following given by W. H. Lyles, one of the counsel for the plaintiff below, which refers to occurrences on the morning of the 13th day of February, 1893, the day on which this suit was brought and before the complaint was filed.

"Question by the COURT: The transaction of the sale had been completed?

A. Yes, we had taken the formal delivery of the deed, and had delivered the bond and mortgage and taken the receipt, put it in our pocket, and went out of the room, then came back and told Dr. Bates (treasurer of the State) that we had the privilege of anticipating the payment.

By counsel for the plaintiff below:

Q. State again the conversation you had with Mr. Tindal.

A. On the day this action was commenced, before we put the papers in the hands of the deputy marshal for service, I went down to the building itself. I found Mr. Boyles, the defend-
50 ant, in possession of the building, and I told him I had come down to demand possession of the building. He told me he was there in the custody of the building, under the instructions of the secretary of state, and that he was instructed not to give up the possession of the building to me, and I would have to see the secretary of state. I went immediately to his office, having had some trouble in the first case about the matter, and I told him of my conversation and Mr. Boyles' statement to me that he was holding the property under the instructions of the secretary of state. He said I had stated the matter correctly, that he was instructed by the commissioners of the sinking fund to hold that property as the property of the State of South Carolina, and he couldn't give the possession of the property to me, that he held it as agent of the board of the sinking fund commissioners of the State of South Carolina."

During the cross-examination of W. H. Lyles, one of the witnesses and one of the counsel for the plaintiff below, the following proceedings took place:

"Q. You say you took the deed and went out of the office?

A. Yes.

Q. You came back almost immediately?

A. Came back within the space of 3 or 4 minutes.

Q. What then took place; I want to know what occurred between you and Mr. Muller (Lyles' partner) on the one hand, and Dr. Bates, (State treasurer) on the other, when you went out of the room and immediately returned?

The court directs the jury to withdraw.

Q. You and Mr. Muller went out of the State treasurer's office and almost immediately returned. Now, what occurred between the State treasurer on the one hand and Mr. Muller and yourself on the other?

A. We returned within five minutes, I think within two minutes; we called the State treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond scrip, known as the Blue Ridge Railroad scrip, which we
51 counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered that in payment of the bond and mortgage. We demanded no receipt; we demanded nothing.

Q. And it was refused?

A. Yes, the advertisement was not referred to.

Q. Was it not the purpose of the transaction to create an issue in the U. S. circuit court in order to test the validity of the revenue bond scrip; was not that the object of the purchase?

A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond scrip, but as to the U. S. circuit court we were not——

Q. Then, when you bought it you did not intend to pay for it in good money?

—. We did, and considered the scrip as good as money.

Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment of it in revenue bond scrip?

A. Yes.

Q. Did you happen to know whether the revenue bond scrip had any value in the market?

A. I don't know.

Q. It has not?

A. I don't know that it has.

Q. Very little, if any?

A. Yes.

Q. Had Alexander and Wesley had no use for this property that you know of except to create the issue to which you have referred?

A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

Q. Mr. Wesley holds a large block of revenue bond scrip?

A. Yes."

The court ruled out the foregoing testimony of Lyles relating to the bond scrip taken in the absence of the jury, and the jury were called into court.

At the close of the testimony taken on behalf of the plaintiff below, counsel for defendants entered a motion for a nonsuit.

The court ruled as follows: "The object and purpose of this suit is the obtaining possession of a certain tract of land in the city of

Columbia. The plaintiff not being actually in possession of
52 the land, is obliged to show that he has in himself such title as warrants a possession. For that purpose he has introduced testimony that he holds title under the State, and in the same testimony he offers evidence that he has made demand under that title, was refused upon the ground that the parties were holding by virtue of the State, both parties referring their claim to the same source, and the motion for nonsuit is overruled."

Tindall, one of the defendants, testified, among other things, as follows, speaking of Agricultural Hall:

"Q. Was there any one at the time of the alleged deed to Alexander; was there anybody in that building at that time?

A. Yes.

Q. Who was there?

A. The railroad commissioners had their rooms there, and I had engaged two rooms to Mr. Boyden, editor of a paper, for which he paid $2.00 a month each, and the Weather Bureau had their office in the building. I found them there when the building came into my possession, and I did not remove them; they are there yet.

Q. Since that time how is that building used?

A. Those same parties I have mentioned are there; and a little later on the dispensary was established in that building. I think that was some time in the spring of last year. Mr. Traxler, who is the State dispenser, has his office there, and liquors belonging to the State."

At the close of the testimony the defendants below entered a motion to dismiss the complaint on the plea to the jurisdiction of the court founded on their allegation that the premises were the property of and in the possession of the State of South Carolina in actual public use at the time of the commencement of the suit; contending that they, Tindal and Boyles, were mere custodians and care-takers of the premises, not in possession or having any interest in them, and were not proper parties to the suit, it being in effect a suit against the State of South Carolina.

The court below overruled this motion to dismiss, holding that the cause was not in effect a suit against the State of South Carolina; that the defendants were proper parties, and that the court had jurisdiction.

The case was tried on the 7th of April, 1893, ending in the following verdict of the jury: "We find for the plaintiff the possession of the land in dispute as described in the complaint."

53 The plaintiffs in error assign as errors:

1st. That the court below erred in excluding the testimony of W. H. Lyles given on cross-examination relating to the intention to pay the deferred instalments in railroad bond scrip.

2nd. That it erred in overruling motion for nonsuit on the ground that no evidence was given by the plaintiff below to show title in himself by grant from the State, and a source of title common to both plaintiff and defendants.

"And for a second defense:"

3rd. That the court erred in overruling motion to dismiss on the ground that the defendants below were mere custodians and caretakers of the premises not in possession nor having any title or interest in them, and that they were the property of the State.

HUGHES, *District Judge*, after stating the case as above:

The first assignment of error in this case relates to the testimony of W. H. Lyles, on cross-examination, tending to show that the plaintiff below, Edward B. Wesley, had made the purchase of the premises with the secret intention of paying the deferred instalments of the purchase-money in a valueless kind of paper issued by the State called Blue Ridge Railroad bond scrip. The court below refused to allow this evidence to go to the jury, and this ruling is assigned as error. The payment of the first instalment of the purchase-money, the execution of the deed of conveyance to the purchaser, and his counter-execution of bond and mortgage for the deferred instalments, made the transaction a perfect and complete one to confer title upon the purchaser, and to entitle him to possession of the premises. The suit which he brought for this possession involved no other enquiry than whether his first payment had been made, whether a valid deed of conveyance had been executed, and whether he had further complied with the terms of sale relating to the bond and mortgage for the future instalments.

What might have been his secret intentions with respect to the deferred payments was a question foreign to his suit for pos-
54 session of the premises to which he had become entitled; and all evidence in regard to such intentions was properly ruled out.

The second assignment of error, based upon a denial that any evidence had been introduced showing a grant of the premises from the State to the plaintiff below, is waived by the defense, and a consideration of it by us rendered unnecessary.

The third and principal ground assigned as error is a denial of the jurisdiction of the court below to try the cause, because of the allegations in the pleadings that the premises in dispute were, on the date of plaintiff's demand for possession, and have been ever since, the property of the State of South Carolina, in actual public use; that the defendants below were officers of the State, and in custody of the premises only as such, and that they have no right, title, interest or estate of any kind to or in the said premises.

It is well-settled law that a sovereignty cannot be sued except by its own consent. The doctrine applies alike to the Government of the United States, and to the States themselves, composing the Union.

But it is equally well settled that suits may be brought, under special circumstances, for property claimed by a State and in the possession of individual persons holding for and in the name of the sovereign. There is some confusion in the decisions on this question, when they come to define what the special circumstances and conditions are under which the property of a sovereign in posses-

sion of agents or officers may be the subject of suits against such persons. In the present case we are saved the task of entering upon a general survey of the decisions on this vexed question that have been rendered in the courts of this and the mother country. The case at bar is practically and in principle all-fours with that of United States *v.* Lee, or Kaufman *v.* Lee, 106 U. S., 196; and is ruled by the decision in that case, and in Stanley *v.* Schwalby, 147 U. S., 508.

The complaint in the case at bar specifically charges that "the plaintiff being lawfully possessed of the premises, the defendants, on the 20th of February, 1892, wrongfully entered into said premises and ousted plaintiff, and that the defendants are and ever since have been and still are withholding the same from the plain-
55 tiff" against his demand. Issue was joined on this allegation, and the verdict was for the plaintiff below, on evidence proving an ouster and tort. The action was in substance for trespass and tort, and it is in this respect that the case at bar is all-fours with that of Kaufman *v.* Lee, and ruled by the decision of the Supreme Court therein.

In the case of Stanley *v.* Schwalby, at p. 518, the Supreme Court say:

"It may be accepted as unquestioned that neither the United States nor a State can be sued as defendant in any court in this country without their consent, except, &c., &c. Accordingly, whenever it can be clearly seen that a State is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defence is, that he has acted under the orders of the Government. In those cases he is not sued as an officer of the Government but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence he must show that his authority was sufficient in law to protect him. In this class of cases is included United States *v.* Lee, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence."

A case rarely arises in the courts more fully within the terms of a ruling decision than is the case at bar within the meaning and tenor of the language of the Supreme Court in the case of Stanley

v. Schwalby, confirming and explaining the decision in Kaufman *v.* Lee.

56 We think there was no error in the action of the court below in entertaining this suit as not a suit against the State of South Carolina and in giving judgment for the plaintiff below.

The judgment of the court below is affirmed.

57 On the same day, to wit, February 5, 1895, the court made and entered the following judgment:

United States Circuit Court of Appeals, Fourth Circuit.

J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,
vs.
EDWARD B. WESLEY, Defendant in Error. } No. 96.

In error to the circuit court of the United States for the district of South Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs. It is further ordered that the mandate of this court issue after the expira-

58 tion of twenty days from the date hereof.

February 5, 1895.

N. GOFF.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fourth Circuit, February Term, 1895.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true copy of the entire record in the said entitled cause in the said circuit court of appeals.

Seal of United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, this 14th day of February, A. D. 1895.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals.

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

59 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which J. E. Tindal and J. R. Boyles are plaintiffs in error and Edward B. Wesley is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of South Carolina, *and* we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
60 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

61 [Endorsed:] Supreme Court of the United States, October term, 1894. No. 919. J. E. Tindal & J. R. Boyles *vs.* Edward B. Wesley. Writ of certiorari & return thereon.

62 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,
vs.
EDWARD B. WESLEY.

Petition *for* plaintiffs in error for a writ of certiorari to the United States circuit court of appeals for the fourth circuit.

Whereas by an order of the Supreme Court of the United States the writ of certiorari in the above-stated case has been issued and sent down to the circuit court of appeals:

Now, we, the undersigned, attorneys for petitioner- and plaintiff-in error and attorneys for Edward B. Wesley, hereby agree that the transcript now on file in the United States Supreme Court upon the application for said writ be taken and considered as the return to the writ of certiorari issued in the case.

SAMUEL W. MELTON,
Att'y for Petitioner-.
WM. H. LYLES,
JOS. W. MULLER,
Att'ys for Edward B. Wesley.

I do certify that the foregoing is a true copy of the original agreement of counsel filed and now of record in the said entitled cause.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, this 22nd day of April, A. D. 1895.

HENRY T. MELONEY,
Cl'k U. S. Ct. Ct. Appeals, 4th Ct.

63 United States Circuit Court of Appeals for the Fourth Circuit.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do hereby make return of the annexed writ of certiorari, issued out of the Supreme Court of the United States and directed to the judges of the United States circuit court of appeals for the fourth circuit, by attaching hereto a certified copy of the agreement of counsel in the cause entitled in the said writ, that the transcript of the record now on file in the said Supreme Court be taken and considered as the return to the said writ.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 22nd day of April, A. D. 1895.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

64 [Endorsed:] Case No. 15,803. Supreme Court U. S., October term, 1896. Term No., 231. J. E. Tindal *et al.*, P. E., *vs.* Edward B. Wesley. Writ of certiorari and return. Office Supreme Court U. S. Filed Aug. 1, 1895. James H. McKenney, clerk.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 949.

J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY.

PETITION OF PLAINTIFFS IN ERROR FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SAMUEL W. MELTON,
Attorney for Petitioners.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

(15,803.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 919.

EX PARTE J. E. TINDAL AND J. R. BOYLES IN RE J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY, DEFENDANT IN ERROR.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of J. E. Tindal and J. R. Boyles, plaintiffs in error in the above-stated case, in the United States circuit court of appeals for the fourth circuit, respectfully shows—

That an action to recover the possession of real property, situate in Richland county, in the State of South Carolina, was commenced in the United States circuit court for the district of South Carolina by Edward B. Wesley against your petitioners, and a judgment was rendered therein by the said court against them for the recovery of the possession of the property; that the complaint in said action

showed the plaintiff to be a citizen of the State of New York and the defendants citizens of the State of South Carolina.

That an appeal was taken by them by writ of error from the judgment of the United States circuit court to the United States circuit court of appeals for the fourth circuit, sitting in Richmond, Va., upon an assignment of errors and bill of exceptions contained in the certified copy of the entire record in the case in the said circuit court of appeals, hereto attached and forming part of this petition; that such proceedings were taken that a hearing was had in the said circuit court of appeals for the fourth circuit, and after said hearing the appeal was dismissed and the judgment of the circuit court affirmed, as will appear from the judgment contained in the certified copy of the record hereto attached.

That the judgment rendered by the circuit court of appeals in the said action on the appeal was a final judgment, as the complaint shows the parties to the action to be citizens of different States, and this confers the jurisdiction upon the said court to render a final judgment.

That in such an action your petitioners are advised that under the law they have the right to make application to the Supreme Court of the United States for a writ of certiorari to remove the record and case from the circuit court of appeals to the Supreme Court for review and determination.

That they allege and state that they are advised there was error in the judgment of the United States court of appeals in dismissing the appeal and affirming the judgment of the United States circuit court, as the assignment of errors and bill of exceptions should have been sustained on all the grounds therein stated, and there should have been a reversal of the judgment of the United States circuit court.

Your petitioners further show that the said J. E. Tindal, as secretary of state, and the said J. R. Boyles, as employé, were in the custody of the premises in controversy as mere

care-takers under section 82 of the Revised Statutes of the said State, which provides as follows:

"The secretary of state shall take charge of all the property of the State, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the directions and instructions of the commissioners of the sinking fund, and act as their agent in such redemption, lease, and sale as they may make of forfeited and vacant lands and lands purchased by the late land commissioners of and in the State the negotiations therefor and arrangements in relation thereto."

And, further, that at the time of the commencement of this action, as appears in the evidence, your petitioners were not in the actual occupation of said premises and had no interest or estate therein, but that possession thereof was then held by tenants paying rentals to the State, and that therefore your petitioners were not proper parties to the action, and they submit that there was error in the circuit court of appeals in not so holding, and thereupon in not dismissing this action.

And your petitioners further show, as they submit, that the said property was at the commencement of the action and now is in the actual ownership of the State; that in the execution of the said judgment of the circuit court of appeals the marshal of the district of South Carolina will be required to seize and take property directly in the ownership of the State; that therefore the suit is against the State, and they submit that the circuit court of appeals should have so held, and therefore should have sustained the appeal of your petitioners on this ground.

And your petitioners further show that the judgment of the circuit court of appeals has been rendered on the appeal, but the mandate from the court has not been sent down to the circuit court, and they desire a stay of the same until their application for a writ of certiorari has been heard and determined.

Wherefore your petitioners pray that a writ of certiorari may be issued by this Court, directed to the clerk of the United States circuit court of appeals for the fourth circuit, requiring him, for said court, to certify to this Court the entire record and proceedings in the case of "J. E. Tindal and J. R. Boyles, plaintiffs in error, *versus* Edward B. Wesley, defendant in error," specified in this petition and attached certified record for review and determination, and that the said clerk be directed to return the same to this Court, according to the command of the writ; and, further, that the mandate in said case of the United States circuit court of appeals for the fourth district be stayed until this application for a writ of certiorari has been heard and determined.

SAMUEL W. MELTON,
Attorney for Petitioners.

STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally come before me J. E. Tindal and J. R. Boyles, each of whom, being separately sworn, deposes and says that the matters and facts stated in the foregoing petition are true of his own knowledge.

J. E. TINDAL.
J. R. BOYLES.

Sworn to before me this 11th day of February, 1895.
[SEAL.] D. H. MEANS,
Notary Public for South Carolina.